

Journal of Air Law and Commerce

Volume 43 | Issue 1

Article 6

1977

Rights to Recover Unreasonable Rates Under the Federal Aviation Act

Randy S. Brooks

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Randy S. Brooks, *Rights to Recover Unreasonable Rates Under the Federal Aviation Act*, 43 J. AIR L. & COM. 121 (1977)
<https://scholar.smu.edu/jalc/vol43/iss1/6>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Comments

RIGHTS TO RECOVER UNREASONABLE RATES UNDER THE FEDERAL AVIATION ACT

RANDY S. BROOKS

Under the Federal Aviation Act (Act),¹ the Civil Aeronautics Board (CAB) has the authority to perform such acts, conduct such investigations, issue and amend such orders, and make such general and specific rules, regulations, and procedures as it deems necessary, consistent with the provisions of the Act.² Sections 1002(d) through (g) of the Act delimit the CAB's power to determine and prescribe rates.³ Whenever the CAB decides that rates or fares for either interstate or overseas transportation⁴ are unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, it is authorized to determine and prescribe the lawful rate or fare to be charged thereafter. In addition, if the CAB finds that rates for foreign travel are unjustly discriminatory or unduly preferential or prejudicial, it can alter those rates and order the carrier to comply with the alteration. Although it must provide notice and a hearing before prescribing any new rates or fares,⁵ the CAB can decide that rates or fares are objectionable either on its own initiative or after receiving a complaint.

In examining and setting rates the CAB must take several factors into consideration, including the effect of the rates upon the movement of traffic, the public's interest in low-cost yet adequate and efficient air transportation, quality-of-service standards which may have been established by law, the advantages of air transportation, and the need for sufficient revenue to provide adequate and efficient service.⁶ In addition, section 404 requires the

¹ Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. §§ 1301 *et seq.* (1970 & Supp. V 1975), *formerly* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

² 49 U.S.C. § 1324(a) (1970).

³ 49 U.S.C. § 1482(d)-(j) (1970 & Supp. V 1975).

⁴ The CAB does not have rate-making authority over intrastate transportation.

⁵ 49 U.S.C. § 1482(d)-(f) (1970).

⁶ 49 U.S.C. § 1482(e) (1970).

air carriers to establish just and reasonable rates and prohibits them from granting preferential treatment or subjecting to unjust discrimination any person, port, locality, or description of transportation.⁷ Finally, whenever an air carrier files a tariff with the CAB proposing new rates or fares for either interstate and overseas transportation or foreign transportation, the CAB may, either after a complaint or on its own initiative, hold a hearing concerning the lawfulness of the new rates. The CAB may suspend the operation of the proposed tariff for up to 180 days for interstate and overseas air transportation and up to 365 days for foreign air transportation, and after the hearing it may take any action that would have been appropriate had the proceeding occurred after the rate was already in effect.⁸

Despite its prospective authority to determine, alter, and suspend rates, the CAB is not authorized to award a recovery to those persons who have paid rates which are determined to be either unlawful⁹ or unreasonable.¹⁰ Recent cases involving unreasonable rates have discussed this absence of authority and present the questions of whether or not such a remedy should exist, and if so, what form it should take.

⁷ 49 U.S.C. § 1374 (1970).

⁸ 49 U.S.C. § 1482(g)-(j) (1970 & Supp. V 1975).

⁹ "Unlawful rates" are those rates which either vary from the rate schedules announced in the air carrier's tariffs or are not established in the manner specified in the Act. An example of this is *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970) (*Moss I*), in which the court held that rates made by the CAB had to comply with the notice and hearing requirements of §§ 1002(d)-(e) of the Act.

¹⁰ "Reasonable rates" are not defined in the Act. but in *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 966, *reh. denied*, 425 U.S. 966 (1976) (*Moss II*), the court explained that:

Reasonable rates, in this regulated industry as in others, are those which are as low as possible, but still allow the industry to provide "adequate and efficient service" and earn a reasonable rate of return, thus assuring its ability to attract necessary capital in the future. The just and reasonable rate, in short, is the rate at which, under a given set of economic circumstances, the industry will perform efficiently as that term is defined in the statute.

Id. at 308.

Interestingly, although § 316(d) of the Interstate Commerce Act (49 U.S.C. 316(d) (1970)), states that unreasonable rates are also unlawful, nowhere in the Federal Aviation Act does that statement appear.

JUDICIAL DISCUSSION

*Danna v. Air France*¹¹ involved a violation of section 404(b) of the Act,¹² which provides that no air carrier shall give any unreasonable preference to any person or subject any person to any unjust discrimination. The plaintiffs claimed to represent the class of persons who flew between New York and London or Paris and who paid more than other passengers because of their age. Two questions were presented: whether the claim that discrimination or preference in an air carrier's fares was a violation of section 404(b) was within the primary jurisdiction of the CAB, and whether, if the CAB found that the fares violated section 404(b), a private right of action would exist under the Act.¹³ The district court held and the Second Circuit Court of Appeals agreed that claims that tariffs are either unreasonable in amount or unduly discriminatory in effect must be determined initially by the agency with which the tariffs are filed.

The district court also held that no remedy would have been available even if the CAB had determined that the tariff was violative of section 404(b). The court decided that because the Act contains no provision for reparation for past acts, no federal rights of action for such reparations should be implied.¹⁴ In declining to find an implied right under section 404(b), the court found it significant that Congress, in the face of CAB requests for such a reparations provision,¹⁵ had failed to legislate one. The district court also expressed apprehension that different courts granting different remedies would undermine the uniform administration of the Act. The appellate court, however, refused to affirm this part of the decision, holding that it was unnecessary to decide the question of reparations unless and until the CAB decided that the tariff was unduly discriminatory.¹⁶

A second series of decisions also discussed the possibility of awarding reparations for unreasonable rates and, in addition, described a standard for any recovery that might be allowed. In

¹¹ 334 F. Supp. 52 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 407 (2d Cir. 1972).

¹² 49 U.S.C. § 1374(b) (1970).

¹³ 334 F. Supp. at 54.

¹⁴ 334 F. Supp. at 61.

¹⁵ See [1964] CAB ANN. REP. 69-70.

¹⁶ 463 F.2d at 408-09.

Moss v. CAB (Moss I),¹⁷ several air carriers had filed increased passenger tariffs with the CAB. Representative John E. Moss (D-Cal.) and his colleagues protested that the procedure which the CAB had followed in investigating those tariffs excluded the public from the rate-making process. In response the CAB suspended the submitted tariffs but in the same order outlined a fare formula and announced that tariffs which implemented that formula would not be suspended. The carriers withdrew the previous tariffs and filed new ones based on the CAB's formula, and when the CAB refused to grant Representative Moss's request to suspend the new tariffs, Moss filed a petition with the District of Columbia Circuit Court of Appeals asking for a review of the CAB's orders.¹⁸ The court held that the CAB had done all that it could, short of formally styling its order as rate-making, to induce the carriers to adopt the proposed rates and that to allow the CAB to shut out the public by not giving notice, holding hearings, and taking statutory factors into account was impermissible.¹⁹

Following the court's decision that the rates charged pursuant to the CAB's initial order were unlawful, seven lawsuits were filed, each claiming to represent the class which had paid the unlawful rates and seeking to recover the amounts in excess of the last lawfully established rates. These cases were consolidated in *Weidberg v. American Airlines, Inc.*²⁰ The court in *Weidberg* was asked by the defendant airlines to stay the actions until the CAB was able to establish whether the rates that had been charged were unjust and unreasonable as well as unlawful. Plaintiffs, however, claimed that they were entitled to recover not merely the unreasonable portion of any rates paid, but also any amount which exceeded the lawful rates.²¹ In finding for the defendants, the court relied on *Atlantic Coast Line Railroad v. Florida*,²² a United States Supreme Court case in which Justice Cardozo rejected a similar claim to recover all amounts in excess of the last lawfully estab-

¹⁷ 430 F.2d 891 (D.C. Cir. 1970).

¹⁸ The petition was filed pursuant to § 1006 of the Act, 49 U.S.C. § 1486 (1970).

¹⁹ 430 F.2d at 902.

²⁰ 336 F. Supp. 407 (E.D. Ill. 1972).

²¹ 336 F. Supp. at 409.

²² 295 U.S. 301 (1935).

lished rates.

In *Atlantic Coast Line*, the Interstate Commerce Commission (ICC) had established rates for freight carriers. Pursuant to a determination that the rates were procedurally defective, several shippers sought to recover the amounts by which the rates exceeded lawful rates. Rejecting their claim, the Supreme Court held that an action for restitution of money was an equitable action and that to make the carriers return the money the plaintiffs must show that "a fixed and certain duty has been laid upon a court of equity to make the carrier pay the price of the blunders of the commerce board in drawing up its findings."²³ The *Weidberg* court found that the decisive element in *Atlantic Coast Line* was the reasonableness of the rate schedule; accordingly, it granted a stay in the proceedings until the CAB had finished its investigation into the reasonableness of the rates.²⁴ Like the Second Circuit in *Danna*, it ruled that a decision regarding the existence of an implied federal right of action must await a determination of unreasonableness by the CAB.²⁵

Following the *Weidberg* decision, Representative Moss and some colleagues sought review of the CAB's determination that the rates were in fact not unjust or unreasonable in *Moss v. CAB* (*Moss II*).²⁶ Again, petitioners claimed that the right to recover passenger fares did not depend upon their having been "unreasonable," but could be predicted solely on their having exceeded the last preceding fares that were lawfully established. They also claimed that even if recovery were limited to the "unreasonable" portion of the rates, the CAB had erred in its determination and that even if the general fare levels were not "unreasonable," those passengers who had paid "unjustly discriminatory rates" should be granted recovery. The *Moss II* court noted that no explicit right of recovery existed in the Act and then turned to other statutory schemes to see what standards for recovery had been used in similar cases.

Examining *Atlantic Coast Line* and other cases arising under

²³ *Id.* at 314.

²⁴ 336 F. Supp. at 414.

²⁵ *Id.* at 412-13.

²⁶ *Moss v. CAB*, 521 F.2d 298 (D.C. Cir. 1975), *cert denied*, 426 U.S. 966. See generally Note, 42 J. AIR L. & COM. 639 (1976).

the Interstate Commerce Act,²⁷ the court found, like the *Weidberg* court, that equitable principles governed actions for restitution and that the reasonableness of rates was a prime determinant.²⁸ The *Moss II* court also examined the reparations provision of the Natural Gas Act,²⁹ cases involving the remedial authority of the Metropolitan Area Transit Commission,³⁰ and *United States v. Morgan*³¹ (involving an order of the Secretary of Agriculture reducing stockyard rates to a just and reasonable level), and concluded that, at the least, unreasonable rates must be found by the CAB before a recovery might be granted and that equitable considerations might prevent recovery even where fares exceeded what was just and reasonable.³² The court then found both that the CAB's determination of reasonableness was proper and that the CAB had correctly focused its decision on the types of equitable factors which might prevent a recovery in any case.³³ In response to plaintiffs' charge of unjust discrimination, the court decided that the carriers were acting in direct response to what the CAB considered to be lawful and therefore that no recovery was warranted.³⁴

The *Moss II* court, by proposing a standard for recovery, seemingly presupposed an underlying right to recover; this right, however, has not been conceded by other courts. For example, the district court in *Danna* carefully studied the question and held not only that section 404(b) did not create an implied federal right of action,³⁵ but also that the absence of a reparations provision in the Act precluded any common-law cause of action.³⁶ Subsequently the *Weidberg* court, while not going so far as to exclude a right of recovery, clearly maintained that the absence of a reparations provision was one that would have to be re-

²⁷ 49 U.S.C. §§ 1(5), 3(1), 8, 9 (1970).

²⁸ 521 F.2d at 304.

²⁹ 15 U.S.C. § 717(e) (1970).

³⁰ The Metropolitan Area Transit Commission for a time oversaw the operation of a transit company in the District of Columbia area. See 521 F.2d at 306.

³¹ 307 U.S. 183 (1939).

³² 521 F.2d at 308.

³³ *Id.* at 314. Specifically, the court found that the carriers had not received excessive and unlawful returns from the fare level, and that there was no fund of net enrichment from which restitution could appropriately be made.

³⁴ *Id.*

³⁵ 334 F. Supp. at 61.

³⁶ *Id.* at 63.

solved before any recovery could be granted.³⁷ The Second Circuit Court of Appeals, however, refused to affirm the district court's ruling in *Danna*, claiming that it was premature,³⁸ and the *Moss II* court left the distinct impression that it might find an implied right of action if a plaintiff meeting the court's standard for recovery should appear before the court.

The *Moss II* court recognized that, like the Federal Aviation Act, the motor carriers' portion of the Interstate Commerce Act had been passed without a reparations provision and that in *T.I.M.E. Inc. v. United States*³⁹ that lack had been held to preclude recovery by payers of unreasonable motor carrier rates. The *Moss II* court's interpretation of *T.I.M.E.* was a very narrow one, however, limiting it solely to a situation where the claim was made by way of a defense in an action against a carrier who had sought to collect properly filed and unchallenged rates. In addition, the *Moss II* court qualified the *T.I.M.E.* decision by mentioning that in *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*⁴⁰ the Supreme Court held, over the objections of *T.I.M.E.*'s author, Justice Harlan, that common-law remedies that were consistent with the regulatory scheme could survive the enactment of the Motor Carrier Act.⁴¹

The *Moss II* court implied that it believed a remedy might exist under the Federal Aviation Act. The court noted that in cases involving the Metropolitan Area Transit Commission, the governing statute contained no provision for recovery of excessive rates, and yet the Court of Appeals for the District of Columbia Circuit had held that the transit company could not retain rates collected pursuant to an improperly authorized fare increase, but must utilize the amount collected for the benefit of the class who paid it.⁴² The *Moss II* court's cryptic statement that the standard for recovery precludes relief to the plaintiffs—"at least at this stage

³⁷ 336 F. Supp. at 412-13.

³⁸ 463 F.2d at 408-09.

³⁹ 359 U.S. 464 (1959). *T.I.M.E., Inc.* was an interstate carrier which had charged, pursuant to a tariff filed with the Interstate Commerce Commission, a rate which the United States claimed was unreasonable.

⁴⁰ 371 U.S. 84 (1962).

⁴¹ 521 F.2d at 305.

⁴² *Id.* at 306.

of the proceedings"⁴³—seemingly indicates that the court believed that a remedy does exist somewhere.

Despite these inferences, no recovery has yet been granted to any persons who might have been subjected to unjust discrimination or who might have had to pay unjust and unreasonable rates or fares. Presumably the courts will eventually find such a plaintiff and will have to decide whether a recovery should be granted and, if so, what type it should be. An examination of the remedies that have been developed in analogous non-aviation situations furnishes a basis for discussing appropriate aviation remedies.

REMEDIES DEVELOPED IN NON-AVIATION SITUATIONS

The question of what types of remedies might be available to recover unreasonable or discriminatory rates has been discussed in several non-aviation contexts, and especially in cases arising under the Interstate Commerce Act (ICA).⁴⁴ Three types of remedies in particular have been considered: a common-law right of restitution, a reparations provision within the statute, and the conditioning of certificates of convenience upon the refund of unreasonable rates.

A. Remedies Under the Statute

The ICA is the basic statute regulating transportation in the United States. It is administered by the ICC and is composed of four parts, regulating railroads and pipe line carriers,⁴⁵ motor carriers,⁴⁶ water carriers,⁴⁷ and freight forwarders,⁴⁸ respectively. Part I of the ICA,⁴⁹ pertaining to railroads, contains the most elaborate provisions relating to the recovery of unreasonable and discriminatory charges. Section 1(5) provides that all charges shall be

⁴³ *Id.* at 304.

⁴⁴ 49 U.S.C. §§ 1-27, 301-27, 901-23, 1001-22, 1231-40 (1970 & Supp. V. 1975).

⁴⁵ Interstate Commerce Act §§ 1-24, 24 Stat. 379 (1887), *as amended*, 49 U.S.C. §§ 1-27 (1970 & Supp. V 1975).

⁴⁶ Interstate Commerce Act §§ 201-27, 49 Stat. 543 (1935), *as amended*, 49 U.S.C. §§ 301-27 (1970 & Supp. V 1975).

⁴⁷ Interstate Commerce Act §§ 301-23, 54 Stat. 929 (1940), *as amended*, 49 U.S.C. §§ 901-23 (1970 & Supp. V 1975).

⁴⁸ Interstate Commerce Act §§ 401-22, 56 Stat. 284 (1942), *as amended*, 49 U.S.C. §§ 1001-22 (1970 & Supp. V 1975).

⁴⁹ 49 U.S.C. §§ 1-27 (1970 & Supp. V 1975).

just and reasonable and that every unjust and unreasonable charge is unlawful.⁵⁰ Section 2 declares that if any carrier charges any persons more or less than it charges any other person it is guilty of unlawful discrimination,⁵¹ and section 3 declares that any undue preference or prejudice in the treatment of persons or localities is also unlawful.⁵²

Sections 8, 9, and 16 set forth the remedies which are available under Part I of the ICA.⁵³ Carriers performing any of the above unlawful acts are liable to the person injured for the full amount of the damages sustained,⁵⁴ and the person claiming to be damaged may either make a complaint to the ICC or file suit in any United States District Court.⁵⁵ If a complaint is brought before the ICC, the ICC has the authority to set damages and direct the carrier to pay the injured person.⁵⁶ Interestingly though, since 1916 the ICC has maintained that since its awards of reparation are only prima facie evidence in court of the right to recover and carriers who fail to comply with the ICC orders must be sued in United States District Courts,⁵⁷ the power to award reparations should be vested exclusively in the courts.⁵⁸ Courts have held since *Texas & Pacific Railway v. Abilene Cotton Oil Co.*⁵⁹ that the question of the reasonableness of rates was within an administrative agency's exclusive primary jurisdiction;⁶⁰ however, the ICC has claimed that

⁵⁰ 49 U.S.C. § 1(5) (1970).

⁵¹ 49 U.S.C. § 2 (1970).

⁵² 49 U.S.C. § 3(1) (1970).

⁵³ 49 U.S.C. §§ 8, 9, 16 (1970 & Supp. V 1975).

⁵⁴ 49 U.S.C. § 8 (1970). For a discussion of the damages that may be recovered, see Comment, 45 TEX. L. REV. 984 (1967).

⁵⁵ 49 U.S.C. § 9 (1970).

⁵⁶ 49 U.S.C. § 16(1) (1970 & Supp. V 1975).

⁵⁷ 49 U.S.C. § 16(2) (1970 & Supp. V 1975): "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant . . . may file in the district court of the United States . . . a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises."

⁵⁸ 30 ICC ANN. REP. 75-78 (1916).

⁵⁹ 204 U.S. 426 (1907). "[A] shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable. . . ." *Id.* at 448.

⁶⁰ The doctrine of exclusive primary jurisdiction is founded on the principle

it should not have to make that determination until a lawsuit is filed seeking damages based on the unlawful rates. In any event, under Part I of the ICA, shippers who had paid unreasonable or discriminatory charges could rely on a statutory remedy.

Part II of the ICA, the Motor Carriers Act,⁶¹ has a very different history. When Part II was enacted in 1935, although it declared the charging of unjust or unreasonable rates or the subjecting of any person to undue preference or prejudice to be unlawful,⁶² it did not contain any provision under which a person injured thereby could recover damages. Accordingly, the ICC began to fashion a remedy, beginning with *W. A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co.*,⁶³ and culminating in *Bell Potato Chip Co. v. Aberdeen Truck Line*,⁶⁴ in which the ICC announced what it believed to be the proper procedure for an injured shipper to follow. According to the ICC, the shipper should file an action in a United States District Court which would stay the suit pending reference of administrative questions such as reasonableness to the ICC. A complaint would then be filed with the ICC, and the ICC would determine the justness, reasonableness, or otherwise unlawfulness of the rate in question. The ICC would then issue an order which would be used by the court in formulating its judgment.⁶⁵ In *T.I.M.E., Inc. v. United States*,⁶⁶ however, the Supreme Court held that the fact that unreasonable rates were unlawful did not in itself create a cause of action for the recovery of unreasonable past rates and that despite a "saving clause" stating that rights not inconsistent with the statute were not extinguished,⁶⁷ no common-law right to recover unreasonable past charges survived the passage of the Motor Carrier Act.⁶⁸

that "a court normally should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer." K. DAVIS, *ADMINISTRATIVE LAW TEXT* 374 (3d ed. 1972).

⁶¹ 49 U.S.C. §§ 301-27 (1970 & Supp. V 1975).

⁶² 49 U.S.C. § 316(d) (1970 & Supp. V 1975).

⁶³ 11 M.C.C. 365 (1939).

⁶⁴ 43 M.C.C. 337 (1944).

⁶⁵ Meiklejohn, *Reparations and Overcharges Under Part II of the Interstate Commerce Act*, 19 AD. L. REV. 203, 211 (1966).

⁶⁶ 359 U.S. 464 (1959).

⁶⁷ 49 U.S.C. § 316(j) (1970).

⁶⁸ 359 U.S. at 471, 474.

As a result of ICC recommendations that Congress amend Part II of the ICA to circumvent *T.I.M.E.*,⁶⁹ Public Law 89-170⁷⁰ was passed, providing a reparations procedure. The amendment did not institute the elaborate procedure used in Part I; rather, it simply re-established the procedures available before *T.I.M.E.* Section 204a(2) approved actions at law for reparation,⁷¹ and section 204a(5) defined reparations to include those damages which the ICC finds to have resulted from unjust and unreasonable or unjustly discriminatory or unduly preferential or prejudicial charges.⁷² A study of Part II of the ICA thus reveals two things: that a less elaborate reparations procedure than that established in Part I exists; and that in the absence of a statutory provision for recovery, the Supreme Court has indicated an unwillingness to allow claims based on an implied federal right.

B. *Common-Law Right of Restitution*

The decision in *T.I.M.E.* did not preclude all common-law rights of recovery under the ICA, as is demonstrated by the subsequent Supreme Court case, *Hewitt-Robins, Inc. v. Eastern Freight-Way, Inc.*⁷³ *Hewitt-Robins* involved a shipper's claim for recovery of unreasonable rates caused by a carrier shipping goods over a more expensive interstate route rather than a less expensive intrastate route. Utilizing the procedure advocated by the ICC, the shipper brought its claim in federal district court, which stayed the proceedings pending an ICC investigation into the reasonableness of the practice. The ICC found the practice unreasonable⁷⁴ under section 216(d) of the Motor Carrier Act,⁷⁵ but the district court, basing its decision on *T.I.M.E.*, dismissed the complaint on the ground that the statute neither created a remedy for reparation nor preserved one at common law.⁷⁶ The Second Circuit

⁶⁹ See, e.g., 75 ICC ANN. REP. 192 (1961).

⁷⁰ 79 Stat. 648, 651 (1965), 49 U.S.C. § 304a (1970). The reparations procedure in Part III resembles that of Part I (49 U.S.C. § 908 (1970)); Part IV resembles Part II (49 U.S.C. § 1006a (1970)).

⁷¹ 49 U.S.C. § 304a(2) (1970).

⁷² 49 U.S.C. § 304a(5) (1970).

⁷³ 371 U.S. 84 (1962).

⁷⁴ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 302 I.C.C. 173 (1957).

⁷⁵ 49 U.S.C. § 316(d) (1970).

⁷⁶ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 187 F. Supp. 722 (S.D.N.Y. 1960).

Court of Appeals affirmed the decision,⁷⁷ also on the basis of *T.I.M.E.*, but the Supreme Court reversed, holding that *T.I.M.E.* notwithstanding, the passage of the Act did not extinguish all common-law remedies for reparation.⁷⁸

The Supreme Court based its conclusion on the fact that a recovery for damages caused by misrouting was not inconsistent with the statutory scheme of regulation. The Court admitted that the question of reasonableness was within the ICC's primary jurisdiction but ruled that that did not compel the conclusion that the courts were without power to award damages. The facts that a misrouting claim did not jeopardize the stability of tariffs, that allowing misrouting actions would have a deterrent effect on the use of misrouting practices, and that without such an action, shippers would have no remedy, all buttressed the Court's conclusion. The Court distinguished *T.I.M.E.*, explaining that shippers were already protected against unreasonable rates, both by the fact that carriers had to give 30 days notice before changing tariffs,⁷⁹ thus giving shippers time to object, and by the ICC's power to suspend rates for seven months pending an investigation of those rates.⁸⁰ The Supreme Court thus distinguished the cases on the effect of the exercise of the remedy upon the statutory scheme of regulation. According to section 216(j),⁸¹ if the remedy is inconsistent with that scheme it does not survive.⁸²

Recently, in *Cort v. Ash*,⁸³ a case involving the Federal Elections Campaign Act, the Supreme Court proposed a four-factor test to determine whether a private remedy is implicit in a federal statute not expressly providing one. In *Cort*, the Court explained that the relevant factors are (1) whether the plaintiff is one of the class for whose especial benefit the statute was created, (2) whether there is any indication of legislative intent either to create or deny such a remedy, (3) whether it is consistent with the under-

⁷⁷ *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.*, 293 F.2d 205 (2d Cir. 1961).

⁷⁸ 371 U.S. at 89.

⁷⁹ 49 U.S.C. § 317(c) (1970).

⁸⁰ 49 U.S.C. § 316(g) (1970).

⁸¹ 49 U.S.C. § 316(j) (1970): "Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."

⁸² 371 U.S. at 89.

⁸³ 422 U.S. 66 (1975).

lying purposes of the legislative scheme to imply such a remedy for the plaintiff, and (4) whether the cause of action is one traditionally relegated to state law.⁸⁴ Applying the *Cort v. Ash* test to *T.I.M.E.* and *Hewitt-Robins*, it appears that the third factor, consistency with the legislative scheme, is the relevant one and that the Court could easily reach the same results again.

It seems clear, then, that the survival of a common-law right to reparation in the face of an apparently complete statute such as the ICA depends upon its relation to that statute. Some of the factors which the Supreme Court has considered include whether an aggrieved party is already protected by the statute, whether the remedy would disrupt the administration of the statute, whether allowing the remedy would promote the purposes of the statute, and whether additional remedies are precluded by the statute itself, have been supplemented and perhaps replaced by the factors mentioned in *Cort*. Finally, the existence of the remedy will be determined in a statute-by-statute manner.

C. *Certificates of Convenience and Necessity*

Besides a statutory provision in the Federal Aviation Act or a common-law right to recover, a third way in which restitution of unreasonable rates might be provided for is the conditioning of certificates of convenience and necessity. Under a number of statutes, including the Federal Aviation Act, companies desiring to commence business must obtain certificates from the appropriate administrative agency before doing so.⁸⁵ The agency is authorized to attach conditions to its certificate. The provision in the Act states: "[T]here shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require."⁸⁶

How broad Congress intended the agencies' powers to be under

⁸⁴ 422 U.S. at 78.

⁸⁵ See, e.g., 15 U.S.C. §§ 717e, 717f (1970) (Natural Gas Act; 47 U.S.C. § 214 (1970) (Federal Communications Act); 49 U.S.C. § 1(18) (1970) (Interstate Commerce Act, Part I (Railroads)); 49 U.S.C. § 306 (1970) (Interstate Commerce Act, Part II (Motor Carriers)); 49 U.S.C. § 909 (1970) (Interstate Commerce Act, Part III (Water Carriers)); 49 U.S.C. § 1371(a) (1970) (Federal Aviation Act).

⁸⁶ 49 U.S.C. § 1371(e)(1) (1970).

these certificate-conditioning provisions is not known; the issue received little or no attention in any of the legislative histories of the respective acts.⁸⁷ The few cases involving the issue, however, show a willingness on the part of the courts to give the clauses a broad construction. In *ICC v. Railway Labor Executives Assoc.*,⁸⁸ two unions petitioned the ICC to condition the granting of a certificate authorizing a railroad to abandon certain lines on the implementation of a benefit program for the workers that would be displaced by the abandonment. The ICC protested that such a condition was beyond its power, but the Supreme Court declared that if abandonment of a line was to be considered in light of the public interest there was nothing in the ICA to prevent the ICC from considering the effect of unemployment caused by the abandonment.⁸⁹ In *United States v. Rock Island Motor Transit Co.*,⁹⁰ the Supreme Court held that a condition authorizing the ICC to impose subsequent restrictions on a carrier gave the ICC the power to later prohibit the carrier from operating on certain routes.

In *FPC v. Sunray DX Oil Co.*,⁹¹ the Supreme Court approved an act of the Federal Power Commission (FPC) conditioning a permanent certificate upon the requirement that a natural gas producer refund excessive amounts that were collected under a previous certificate. This was in spite of the fact that sections 4 and 5 of the Natural Gas Act,⁹² which require the FPC to determine the reasonableness of rates and allow it to hold hearings and postpone increases, are strictly prospective in effect.

These cases indicate that the power to condition certificates of convenience and necessity may be limited only by considerations of the public interest and the purposes of the particular statute. While it might seem that conditions imposed in these certificates should be restricted to matters of secondary importance, *i.e.*, that areas of significance should be expressly provided for by Congress, the Supreme Court has not felt bound by such a limitation. Nor

⁸⁷ See Comment, 21 STAN. L. REV. 188 (1968).

⁸⁸ 315 U.S. 373 (1942).

⁸⁹ *Id.* at 376-77.

⁹⁰ 340 U.S. 419 (1951).

⁹¹ 391 U.S. 9 (1968).

⁹² 15 U.S.C. §§ 717e, 717d (1970).

has it restricted the agencies to measures specifically authorized by the statutes, and at least in *Sunray*, the Court has gone so far as to expand the authority of the agency.

In summary, then, it appears that three types of remedies might be available to those claimants who have been injured by unreasonable or unjustly discriminatory rates charged pursuant to tariffs properly filed under the Federal Aviation Act. Congress might amend the Act with a reparation provision, enacting procedures similar either to those in Part I or Part II of the ICA. A common-law remedy for reparation might exist if it were able to meet the requirements enumerated in *T.I.M.E.*, *Hewitt-Robins*, and *Cort v. Ash*. Finally, the CAB might be able to amend the certificates of public necessity and convenience air carriers are required to file before they can engage in air transportation, conditioning the certificates upon the refund of the unreasonable rates.

APPLICABILITY OF REMEDIES TO CAB

Before examining these three remedies in the context of possible application to the CAB, some preliminary issues must be discussed. The threshold question is, of course, whether or not there should be any recovery for unreasonable charges. Perhaps not allowing a recovery strikes a balance between the carrier and the passengers—even though passengers may have had to pay unreasonable rates, there are times when the carrier has been forced to collect unreasonably low rates. This situation occurs, for example, when a carrier files a new tariff under section 403(a)⁹³ and yet cannot charge the higher fares until at least thirty days have passed.⁹⁴ Even then the CAB has authority to suspend the rates for up to 180 days while it determines the lawfulness of the rates.⁹⁵ Further, the absence of a reparation provision might encourage challenges to rate increases when initially filed, thus providing even more protection to passengers, who might not have thought it worthwhile to sue for reparations, but who will benefit from never having had to pay unreasonable rates in the first place.⁹⁶ In addition, rates

⁹³ 49 U.S.C. § 1373(a) (1970).

⁹⁴ 49 U.S.C. § 1373(c) (1970).

⁹⁵ 49 U.S.C. § 1482(g) (1970).

⁹⁶ Note, 73 HARV. L. REV. 84, 217 (1959). *Moss v. CAB*, 521 F.2d 298, 302 (D.C. Cir. 1975) (*Moss II*).

which go into effect unchallenged may acquire a type of de facto reasonableness that should not be easily challenged; however, this argument may also be persuasive in favor of recovery if the only reason the rates became effective was because the suspension period expired before any challenge to the rates was made.

Turning to the Act itself for guidance, section 102⁹⁷ details certain goals the CAB is instructed to consider as being in the public interest and in accord with public convenience and necessity. One of these is the regulation of air transportation so as to foster sound economic conditions in that transportation,⁹⁸ which implies that any remedy, such as restitution, that would undoubtedly cost air carriers more money would hinder those conditions and therefore not be in the public interest.

This concern of the CAB is counterbalanced, however, by another ideal, the promotion of "adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, [or] undue preferences or advantages"⁹⁹ This mandate certainly seems clear enough to encompass the promotion of reasonable fares through the deterrent effect of a recovery for unreasonable ones, and indeed, if the only equity on the side of the carriers is the fact that the rates were not challenged when initially filed, the restoration to passengers of moneys they should not have had to pay seems very desirable.

An additional argument favoring a remedy is that, since the standard for recovery expressed in *Moss II* includes and depends on equitable considerations, some provision for recovery should be developed to enforce those equities when they point to a recovery. On balance, it seems clear that a remedy of some sort is warranted. The question then becomes which of the three remedies proposed is most appropriate.

A. Common-Law Action for Restitution

The easiest remedy to implement would be a common-law action for restitution. Such an action would be based on traditional legal principles rather than a questionable statutory interpretation, and

⁹⁷ 49 U.S.C. § 1302 (1970).

⁹⁸ 49 U.S.C. § 1302(b) (1970).

⁹⁹ 49 U.S.C. § 1302(c) (1970).

it would not require any amending of the Act. Employing the test of *Cort v. Ash*, the relevant factors seem to be whether there is any indication of legislative intent either to create or deny a private right of action, and whether it would be consistent with the underlying purposes of the statute to imply such a remedy.¹⁰⁰ There is no direct evidence of legislative intent in the omission of a reparations provision in the Act; however, evidence exists which indicates that the omission may have been intentional. Since 1962, the CAB has been petitioning Congress for a reparations provision.¹⁰¹ Typical of the CAB's recommendations is: "The Civil Aeronautics Board recommends that the Federal Aviation Act be amended so as to make air carriers and foreign air carriers liable for the payment of damages to persons injured by them as a result of charges collected . . . in violation of section 403 or 404 of the Act."¹⁰² Especially in light of the amendment in 1965 to the Motor Carrier Act, giving the ICC that same reparations authority,¹⁰³ it seems significant that Congress has not passed such an amendment to the Federal Aviation Act. It has been argued, however, that the amendment to the Motor Carrier Act was a direct response to *T.I.M.E.*, whereas the courts have never directly denied a similar common-law remedy with respect to the Federal Aviation Act.¹⁰⁴ If that argument is valid, then the existence of a common-law action under the Act depends upon the consistency factor of *Cort v. Ash*—in effect, whether the situation is more like *T.I.M.E.* or more like *Hewitt-Robins*.

The comparison of the Motor Carrier Act and the two cases decided under it to the Federal Aviation Act is an obvious one and was employed both in *Danna*¹⁰⁵ and in *Moss II*,¹⁰⁶ although with different implications. On its face, *T.I.M.E.* seems to dispose of the matter, since it involved the very question involved here, *i.e.*, recovery of unreasonable, although lawfully filed, rates. Under both statutes, there is a thirty-day waiting period before new rates

¹⁰⁰ 422 U.S. at 78.

¹⁰¹ [1962] CAB ANN. REP. 6.

¹⁰² [1964] CAB ANN. REP. 69-70.

¹⁰³ See note 66 *supra*.

¹⁰⁴ *Danna v. Air Fr.*, 334 F. Supp. 52, 60 (S.D.N.Y. 1971).

¹⁰⁵ *Id.* at 58-62.

¹⁰⁶ 521 F.2d at 305.

become effective;¹⁰⁷ under both statutes the agency involved can suspend proposed rates pending an investigation into their lawfulness;¹⁰⁸ and perhaps most importantly, under both statutes, permitting a court to rule on the reasonableness of rates or continually to require the agency to do so would undercut the stability of the rate structure which the statutory procedures were designed to promote.¹⁰⁹

Nevertheless, two particular distinctions between the statutes should be noted, one strengthening the argument that Congress may not have believed a statutory provision necessary in the Federal Aviation Act, and one supporting the proposition that Congress might not have intended for a remedy to be implied. The first distinction is that the "saving clause" in the Federal Aviation Act is much broader than that in the Motor Carrier Act. Instead of merely providing that consistent remedies are not extinguished,¹¹⁰ the clause in the Federal Aviation Act reads: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."¹¹¹ This was a distinction noticed by the district court in *Danna*,¹¹² which nonetheless denied a common-law remedy by relying on *Texas & Pacific Railway*,¹¹³ which held that a saving clause virtually identical to the one in the Federal Aviation Act did not preserve a common-law remedy to recover an unreasonable freight charge.¹¹⁴ Nor is there any legislative history to indicate that Congress thought that the difference in the two clauses is significant. The second distinction, the one strengthening the presumption against a common-law right, is that whereas Part II of the ICA expressly declares that unreasonable rates are unlawful,¹¹⁵ thus seemingly creating a right, the Federal

¹⁰⁷ 49 U.S.C. § 317(c) (1970) (Interstate Commerce Act); 49 U.S.C. § 1373(c) (1970) (Federal Aviation Act).

¹⁰⁸ 49 U.S.C. § 316(g) (1970) (Interstate Commerce Act); 49 U.S.C. § 1482(g) (1970) (Federal Aviation Act).

¹⁰⁹ 371 U.S. at 87.

¹¹⁰ 49 U.S.C. § 316(j) (1970).

¹¹¹ 49 U.S.C. § 1506 (1970).

¹¹² 334 F. Supp. at 59.

¹¹³ 204 U.S. 426 (1907).

¹¹⁴ *Id.* at 446-47.

¹¹⁵ 49 U.S.C. § 316(d) (1970).

Aviation Act has no such provision. The conclusion, based on Congress' apparently intentional omission of a reparation provision despite the CAB's entreaties, the relevance of the *T.I.M.E.* rationale, and the instability that such a remedy would create in the rate structure, must be that no common-law right to restitution for unreasonable rates should exist.

B. Certificates of Convenience and Necessity

A procedure which might be more consistent with the provisions of the Act is the conditioning of certificates of public necessity and convenience upon the refund of unreasonable rates. The CAB may attach to the exercise of the privilege granted by the certificate such terms, conditions, and limitations as the public interest may require,¹¹⁶ and it may do so either upon issuing the certificate or at any time it feels the public convenience and necessity might so warrant.¹¹⁷ If, as was concluded earlier, the public interest includes the promotion of reasonable rates,¹¹⁸ then there appears to be no reason why such a refund condition is not appropriate. Indeed, in *Sunray*,¹¹⁹ the Supreme Court upheld an order of the FPC providing for refunds in such a manner, in spite of an express lack of authority to do so directly. Traditionally, the conditions upon which certificates have been issued have pertained to the routes to be travelled by the carrier¹²⁰ or the type of service to be provided,¹²¹ but the only express limitation on the CAB is that the certificate may not restrict the carrier's right to add or change schedules, equipment, accommodations, and facilities.¹²²

Since there does not seem to be any restriction on the CAB's ability to condition the certificates on the refund of unreasonable rates, the important considerations are how appropriate it is for the

¹¹⁶ 49 U.S.C. § 1372(e)(1) (1970).

¹¹⁷ 49 U.S.C. § 1372(g) (1970).

¹¹⁸ 49 U.S.C. § 1302(c) (1970).

¹¹⁹ 391 U.S. 9 (1968).

¹²⁰ See, e.g., *Eastern Air Lines, Inc. v. CAB*, 271 F.2d 752 (2d Cir. 1959), *cert. denied*, 362 U.S. 967 (1960) (CAB restricted hearing to needs of cities within geographic boundaries); also *City of Dallas v. CAB*, 221 F.2d 501 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 914 (1955) (CAB specified which airport would best serve area).

¹²¹ See, e.g., *Southern Airways, Inc. v. CAB*, 498 F.2d 66 (D.C. Cir. 1974) (CAB restricted carrier to two-stop service).

¹²² 49 U.S.C. § 1371(e)(4) (1970).

CAB to regulate in this manner and how effective such a condition would be in implementing the purposes underlying a rate recovery. More specifically, the question of appropriateness turns on whether the CAB should be able to do indirectly what it cannot do directly. The Supreme Court's answer with regard to the FPC was yes,¹²³ but there is an indication that the CAB may not be quite so unrestricted. In *Continental Air Lines, Inc. v. CAB*,¹²⁴ the District of Columbia Circuit Court of Appeals refused to let the CAB do through rate-making¹²⁵ something it could not do through a certificate of public necessity and convenience—namely, regulate carrier accommodations.¹²⁶ Although *Continental* was the converse of the situation under analysis—the direct action was conditioning certificates of necessity and the indirect action was rate regulation—it is an example of the challenge that might arise were certificates conditioned on refunds of unreasonable rates.

The second question is how effective such a refund condition would be. In a situation like *Sunray*,¹²⁷ involving a seller of natural gas, it is not difficult to locate the purchasers who are to receive the refunds. The possibility of locating and reimbursing each passenger who paid an unreasonable fare over a period that might well extend over several years, however, is so remote that it would probably not be considered. One solution, though, is the idea used in the Metropolitan Area Transit Commission cases.¹²⁸ In those cases, too, the futility of trying to locate the aggrieved passengers was realized, so the District of Columbia Circuit Court of Appeals ordered the Commission to create a fund to be used for the benefit of the class who had paid the fares.¹²⁹ The Transit Commission cases are particularly appropriate in the context of the Federal Aviation Act, since neither the District of Columbia Code under which the Commission operated nor the Federal Aviation Act authorizes reparations for unreasonable rates.

¹²³ *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968).

¹²⁴ 522 F.2d 107 (D.C. Cir. 1974).

¹²⁵ CAB Order No. 73-6-4 (June 1, 1973).

¹²⁶ *Id.* at 115.

¹²⁷ 391 U.S. 9 (1968).

¹²⁸ *E.g.*, *Bebchick v. Public Utilities Comm.*, 318 F.2d 187 (D.C. Cir.), *cert. denied*, 373 U.S. 913 (1963).

¹²⁹ *Id.* at 203-04.

C. Statutory Amendment

The remedy which would seem to provide the most direct relief and most closely conform to the purposes of the Act is one which Congress, intentionally, inadvertently, or temporarily, has failed to include—namely, a statutory provision for reparation of unreasonable charges. Such a solution avoids both the problem of a common-law remedy, *i.e.*, interference with the stability of the rate structure by the courts, and the difficulties involving conditioning certificates of convenience, *i.e.*, indirect regulation and returning the unreasonable fares to those who paid them. Assuming that reparation for unreasonable rates is desirable, a reparation provision in the Act is certainly the most appropriate remedy. The main question then becomes what type of amendment would be best.

Several factors should be considered in designing the statute. As the *Moss II* court concluded, equitable considerations—including the reasonableness of the rates, rather than the mere exceeding of the last lawfully established rates, have set the standard for recovery in those acts which do provide a remedy.¹³⁰ There is no reason, though, why a statute could not provide for the recovery of all sums in excess of the last lawful rates; in fact, the dissenters in *Atlantic Coast Line* suggested precisely that measure of damages.¹³¹ Moreover, since section 403(b) of the Act¹³² prohibits carriers from charging or collecting any rates other than those filed in its currently effective tariff, it would not be too onerous to require the carriers to repay any excess they collect. Were such a recovery permitted, however, the Act would be the only statute regulating interstate commerce to allow it, and since the question of rates in excess of the last lawfully established rates has been caused most frequently by procedural errors on the part of the respective agencies¹³³ it does seem harsh to make the carrier pay the price of the blunder of the agency.¹³⁴ Fairness is better served when equitable considerations determine the recovery.

Another, more procedural, question is whether the reparation

¹³⁰ 521 F.2d at 307-08.

¹³¹ 295 U.S. at 319.

¹³² 49 U.S.C. § 1373(b) (1970).

¹³³ *E.g.*, *Atlantic Coast Line, T.I.M.E.*, and *Moss II*.

¹³⁴ 295 U.S. at 314.

process should be under the jurisdiction of the CAB or the courts. The ICA has both types of provisions in its various Parts; Part I authorizes complaints before the ICC as well as suits in court,¹³⁵ while Part II contemplates only actions at law.¹³⁶ Even under Part I, though, the ICC prefers that the actual power to award the reparations be vested solely in the courts,¹³⁷ subject to a determination by the ICC that the rates charged were unreasonable. Since orders of the ICC that were not complied with had to be enforced by the complainant in district court,¹³⁸ the ICC argued that its docket would be reduced considerably if all cases involving reparations began in court.¹³⁹ This reasoning is persuasive; the CAB has no more enforcement authority than the ICC,¹⁴⁰ and the only CAB order which is not reviewable by the courts is one which is reviewable by the President.¹⁴¹ It is also the procedure that has been followed in aviation cases—most specifically in *Weidberg v. American Airlines, Inc.*,¹⁴² wherein the court ordered a stay in the proceedings pending a CAB investigation into the reasonableness of the rates charged.

CONCLUSION

The Federal Aviation Act is an anomaly—the only statute regulating carriers in interstate commerce that does not have any provision for reparation or restitution of unreasonable rates and fares. Obviously, the most direct way to remedy that situation would be for Congress to amend the Act to contain a reparation procedure. An appropriate provision would allow complainants to file an action at law to recover unreasonable or unduly discriminatory rates, such action to be stayed pending a finding by the CAB of unreasonableness or discrimination. This would both preserve the roles of the court and the CAB and further the desired goal of reaching an equitable solution.

¹³⁵ 49 U.S.C. § 9 (1970).

¹³⁶ 49 U.S.C. § 304(a)(1) (1970).

¹³⁷ See, e.g., 33 ICC ANN. REP. 53 (1919).

¹³⁸ 49 U.S.C. § 16(2) (1970).

¹³⁹ See, e.g., 30 ICC ANN. REP. 7578 (1916).

¹⁴⁰ 49 U.S.C. § 1324 (1970).

¹⁴¹ 49 U.S.C. § 1452 (1970).

¹⁴² 336 F. Supp. 407 (N.D. Ill. 1972).

The fact that Congress has failed to amend the Act in spite of CAB recommendations hardly indicates that no recovery is intended, especially in light of the congressional response of *T.I.M.E.*; it is probably more an observation that the question of rate recovery seldom arises in aviation and possibly a congressional belief that a common-law remedy in aviation was not precluded by *T.I.M.E.* Courts, however, are more likely to focus on the analogous reasoning of *T.I.M.E.* to find that a common-law remedy is inconsistent with the Federal Aviation Act as well as the ICA. Even reasoning based on the four-factor test of *Cort v. Ash* is likely to result in the conclusion that a common-law right of recovery is inconsistent with the Act. The CAB's authority to condition the terms of carriers' certificates of convenience and necessity seems to provide a possible remedy, but even if a way could be found to return the fares to those who paid them, there is something dissatisfying about using a power designed to establish routes to regulate rates instead. Congress' apparent decision that the issue does not require immediate attention may be correct; however, that is a bad reason to leave the public with only the prospect of a judicially-contrived remedy, especially when the proper one, a statutory amendment, is so apparent.

